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No. 10-703

Supreme Court, U.S.
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In the

Supreme Court of the United States

Ibraham Mumid, Fadumo Muse, Fahmo Ahmed,
Safiya Mohamed, Iftu Jibril,
Maymuna Muktar Osman, Misbah Ibrahim,
Amal Mohamed, Shamsa Ali Mohamed, Yurub Siyad,
Muna Mohamed, Amina Harun,
and Mohamud A. Mohamed,

Petitioners,

v.

Abraham Lincoln High School,
The Institute for New Americans,
Special School District No. 1 and
Metropolitan Federation of Alternative Schools, Inc.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

INSTITUTE FOR NEW AMERICANS/ ABRAHAM LINCOLN HIGH SCHOOL'S BRIEF IN OPPOSITION TO PETITION FOR REVIEW

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Questions Presented

I. Whether petitioners have presented a compelling reason to review the Eighth Circuit's holding that petitioners failed to state a prima facie case of intentional discrimination under Title VI based on the school district's policy of deferring special education evaluations for English Language Learners until they had received three years of academic instruction when:

(A) Petitioners' argument is based on a false premise that the policy is discriminatory on its face, which is contrary to the Eighth Circuit's holding and not addressed in the petition;

(B) The policy differentiated between students based on individual test scores, not on national origin per se; and

(C) Eleven of the thirteen petitioners suffered no injury as a result of the policy because they did not suffer from the "specific learning disabilities" required by federal law.

Parties to the Proceeding

Pursuant to Rule 14.1(b), the caption includes all parties appearing here and before the Eighth Circuit Court of Appeals. The Institute for New Americans notes that Abraham Lincoln High School was a program operated by The Institute for New Americans and is not a separate legal entity.

Corporate Disclosure Statement

Pursuant to Rule 29.6, The Institute for New Americans discloses that it is a privately held, not-for-profit corporation. It does not have a parent corporation, nor are there any publicly held corporations that own 10% or more of The Institute for New Americans' stock.

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Statement of the Case

I. The Parties

A. Abraham Lincoln High School is a non-public, contract alternative school serving recently-arrived teenage immigrants who do not speak English and have no prior education.

The Institute for New Americans ("INA") is a non-profit organization established to provide educational services to immigrants. Record at A-App. 290, 763 (citation to Eighth Circuit Appendices). In addition to an adult basic education program, INA operated Abraham Lincoln High School ("Abraham Lincoln"). *Id.* at 29, 67-68.

Abraham Lincoln is a contract alternative school under Minnesota law. *See* Minn. Stat. § 124D.68, subd. 3(d) (2010); Record at A-App. 925. Contract alternative schools are *non-public* schools that operate under contract with a public school district. Minn. Stat. §124D.68, subd. 3(d). Only students who are at risk of not graduating from traditional high schools are eligible to enroll in contract alternative facilities like Abraham Lincoln. *See id.*, subds. 1, 2(2), 2(10). As defined by statute, at-risk students include those who are at least one grade level behind their peers and/or are English Language Learners ("ELL"). *Id.*

Abraham Lincoln focused on a particular subset of students—immigrants who arrived in the United States between the ages of fourteen and twenty, had little or no prior education, were illiterate in their native languages and could speak

little-to-no English. Record at S-App. 1616. About two-thirds of the student body was eighteen or older, and most (around 95%) lived below the poverty level. Record at A-App. 839, 794, S-App. at 1225.

Unlike many schools, Abraham Lincoln had a highly diverse faculty that mirrored its unique student body. Teachers and staff represented thirteen different countries, with many of the teachers and administrators being highly-educated immigrants. *See* Record at S-App. 1770, A-App. at 816-817, 840, 852, 879, 880, 891. For example, Mohamed Wadi, an assistant principal, spoke four languages, was a physician in his native country and had a Masters Degree in Public Health. *Id.* at App. 852, 879, 880, 891. Nata Samb, the academic dean, was a native of Senegal who held Bachelor of Arts Degrees in English and French, a Masters Degree in English Literature, and a Masters Degree in Educational Policy and Administration. *Id.* at A-App. 816, 819; S-App. 1912, 1911. Science teacher Leeka Gwanganlie, similarly, was a Uganda native with Masters Degrees in Physics and Education. *Id.* at S-App. 1908-09, 1911-12, 1497, 1521-24.

In addition to its teaching staff, Abraham Lincoln employed Zahra Samatar, who acted as the special education liaison with the District. *Id.* at A-App. 899. Samatar worked with the part-time special education staff that the District sent to the site weekly to conduct evaluations and provide special education services. *Id.* at A-App. 840, 852.

B. The thirteen petitioners were Abraham Lincoln students who recently had arrived from Somalia and Ethiopia, had little or no prior education and were illiterate in their native languages.

The thirteen petitioners here are characteristic of Abraham Lincoln's student body. With one or two exceptions, they had no prior education, were illiterate in their native languages, and spoke little to no English upon enrollment. *See* Record at A-App. 523, 588, 608, 612, 675, 691, 699, 719. The majority--eight of the thirteen--enrolled at age eighteen or above. *Id.* at S-App. 1497, 1521-1524, 1548, 1603; A-App. 530, 572, 608, 615, 676.

Under Minnesota law, a student's right to a free public education terminates at age 21. *See* Minn. Stat. § 120A.20 (2010). Similarly, under federal law, students no longer are eligible for special education evaluation, testing or services after age 21. *See, e.g.*, 29 U.S.C. § 1412(a)(1)(A), (B).

II. The lawsuit.

A. Petitioners asserted Title VI and MHRA claims against Abraham Lincoln for national origin discrimination in education.

In their Second Amended Complaint, petitioners asserted two claims against Abraham Lincoln: (1) a Title VI claim, alleging that Abraham Lincoln discriminated against them based on national origin in providing educational services; and (2) a Minnesota Human Rights Act ("MHRA") claim, alleging the same. *See* Record at A-App. 77-78. They

did not assert an EEOA claim against Abraham Lincoln, as it is not a public "educational agency" subject to that law. *See, e.g., id.*; 20 U.S.C. §§ 1703(f), 1720, 7801(26), (41) (2006).

Petitioners generally averred that Abraham Lincoln did not use an appropriate curriculum, "warehoused" students in entry-level classes, failed to communicate graduation requirements and failed to provide special education testing and services. Record at A-App. 67-69. The complaint alleged that petitioners Ahmed, Amal Mohamed, Osman, Jibril, Muna Mohamed, and Shamsa Mohamed "likely suffer from a learning disability," while Siyad "suffers from a learning disability." *Id.* at A-App. 70-72. Abraham Lincoln's alleged educational failures, petitioners claimed, constituted intentional discrimination on the basis of national origin in violation of Title VI and the MHRA. *See id.* at A-App. 899.

B. The District Court held that petitioners failed to state a prima facie case of intentional national origin discrimination and that eleven of the petitioners lacked standing to challenge the special education policy.

After the close of discovery, Abraham Lincoln moved for summary judgment on the grounds that petitioners had failed to state a prima facie case for intentional discrimination under Title VI. Title VI, Abraham Lincoln argued, required a showing of intentional discrimination (i.e., disparate treatment); disparate impact did not suffice. *See* Pet. App'x B at 24a, 33a.; *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001)(Title VI requires disparate treatment). Since

petitioners failed to provide any evidence of discriminatory intent, the district court granted Abraham Lincoln's summary judgment motion on that basis. *Id.* at 51a.

The District Court also held, with respect to the claim that the school district wrongfully deferred special-education evaluations for English Language Learners until they had received three years of education, that eleven of the thirteen failed to present any evidence that they were eligible for those services. *See* Pet. App'x B at 39a-40a. They accordingly lacked standing to challenge the allegedly discriminatory special-education policy.

C. The Eighth Circuit affirmed and held that the special-education testing policy was not discriminatory on its face.

The Eighth Circuit affirmed the District Court's holdings on appeal. Pet. App'x A at 19a. In doing so, the appellate court expressly rejected petitioners' claim that the alleged policy of deferring special education testing and assessment for English Language Learners was discriminatory on its face. *Id.* at 10a. Delaying testing for English Language Learners did not single out a protected class on its face, the court held, as ELL status is determined by the score an individual student receives on an English-abilities test and not on his or her national origin per se. *See id.*

The Title VI issue presented in the petition for writ of certiorari is whether "direct evidence of discriminatory intent" is required to challenge a "facially-discriminatory policy....based on

[petitioners'] national origin." Petitioners did not identify as a question on appeal, nor did they argue in their petition, that the Eighth Circuit erred in finding that the deferred-testing policy at issue is not discriminatory on its face.

Reasons The Petition Should Be Denied

I. Petitioners have not satisfied the conditions required to secure review by this Court.

More than 100 years ago, Congress created the Circuit Courts of Appeals to relieve this Court from the burden of general litigation. *See In re Woods*, 143 U.S. 202, 205-06 (1892). Since then, this Court has been chary in granting certiorari, limiting its grant to matters involving a conflict between the Circuit Courts or weighty issues of public interest. *Forsyth v. City of Hammond*, 166 U.S. 506, 514-15 (1897). Certiorari should not be granted in cases that primarily are of interest just to the parties involved. *See id.*

While petitioners cite more than a dozen cases, they identify no split among the Circuits on the Title VI question they present for appeal. Nor do they identify any compelling public interest to address a special-education testing policy for English Language Learners utilized for a limited time by a single school district. Because the review petitioners seek would benefit no one but themselves, the petition should be denied.

A. The petition fails to identify any conflict among the Circuits on the issue presented for appeal.

• The Title VI issue, as framed by petitioners, is whether "direct evidence of discriminatory intent is required to sustain an action against...a...school engaged in facially discriminatory practices...based on [petitioners'] national origin." *See* Pet. at i. They cite *UAW v. Johnson Controls*, 499 U.S. 187 (1991),

in support of their contention. In *Johnson Controls*, this Court held that a policy which required only female employees to provide proof of infertility in order to work in certain positions discriminated against women on its face; it was not transformed from an intentional discrimination claim into a disparate impact claim simply because the employer did not have a malevolent motive. *See id.* at 197-99.

In this case, the Eighth Circuit recognized the holding in *Johnson Controls* and its progeny, but found it inapplicable to the case at bar. *See* Pet. App'x at 10a. The deferred-testing policy for English Language Learners, the court opined, did not single out a protected class on its face. *Id.* The policy did not apply to all foreign-born students in the school district, but only those individuals who scored below the cut-off point on the English-language test. *Id.* at 10a. Students of the same national origin who had more advanced English skills, and accordingly were not categorized as "English Language Learners," were not subject to the policy. *See id.*

The Eighth Circuit's decision in this case, then, not only does not conflict with any other Circuit Courts, it is not even at odds with *Johnson*. Since petitioners failed to identify any conflict among the Circuits or with Supreme Court precedent, the petition should be denied.

B. Petitioners assertion that "[t]he courts are in dire need of a rule to find disparate treatment where there are facially discriminatory policies at work" asks the court to do nothing more than re-affirm *Johnson Controls* without there having been a challenge to it.

In lieu of identifying a weighty and serious matter of public interest warranting this Court's attention, petitioners embark on a meandering soliloquy that lower courts may hesitate to apply *Johnson Controls* without additional direction from this Court, and that this Court must "send a message to other schools" that "they can[not] contract their way out of liability [for intentional discrimination]." Neither contention has merit. The Eighth Circuit's decision does not conflict with or undermine *Johnson Controls*, and the fact that Abraham Lincoln was a contract alternative school had no bearing on petitioners' failure to present a prima facie case of disparate-treatment discrimination.

Johnson Controls was a Title VII case in which the employer implemented a policy barring all potentially fertile women from jobs exposing them to certain levels of lead. *Id.* at 192, 196-97. Although the Seventh Circuit acknowledged that the fetal-protection policy was directed solely towards women, it analyzed the policy as if it were neutral on its face and only had a discriminatory *impact* on women's employment opportunities. *Id.* at 194-97. This Court granted certiorari to resolve a split among the circuits and address whether an employer lawfully could discriminate against women solely because of

their child-bearing ability when motivated by a desire to protect the fetus. *Id.* at 196.

This Court held that the policy explicitly discriminated against women based on sex. *Id.* at 197. Because the policy required only female employees to prove that they were not capable of reproducing in order to work in the specified jobs, the policy was sexually discriminatory on its face. *Id.* at 198. The fact that the employer may not have had a malevolent motive did not convert the facially-discriminatory policy (i.e., a disparate treatment claim) into a neutral policy with discriminatory effect (i.e., a disparate impact claim). *Id.* at 199.

Respondents here do not quibble about the *Johnson Controls* decision or its import. Abraham Lincoln has not argued—nor did the Eighth Circuit hold—that a policy that is discriminatory on its face does not constitute evidence of intentional (i.e., disparate treatment) discrimination. Rather, Abraham Lincoln argued that the policy here *was not facially discriminatory*, because the policy differentiated based on individual test scores and not national origin per se. The Eighth Circuit agreed.[1] Since the Eighth Circuit's decision does not either conflict with or undermine *Johnson Control's* holding,

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[1] The Second Circuit Court of Appeals likewise has held that "language, by itself, does not identify members of a suspect class." *See Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983), *cert. denied*, 466 U.S. 929. And the district courts, too, have found that Title VI does not prohibit discrimination on the sole basis that a person speaks a primary language other than English. *See, e.g., Franklin v. District of Columbia*, 960 F. Supp. 394 (D.D.C. 1997), *rev'd on other grounds*, 163 F.3d 625 (D.C. Cir. 1998

the public interest does not require further review by this Court.

II. Eleven of the thirteen plaintiffs have no standing to seek review because the Eighth Circuit held that they had not sustained an injury in fact and petitioners have not identified that issue for consideration by this Court.

It is beyond contention that Article III jurisdiction must exist in order for this Court to accept review of petitioners' claims. Article III, Section 2 of the United States Constitution restricts the jurisdiction of the federal courts to "Cases" or "Controversies." *Arizonans for Official English v. Arizona*, 542 U.S. 43, 64 (1997). Standing to sue is part of this requirement.

In order to have standing, the plaintiff must allege that (1) he has suffered an injury-in-fact; (2) the injury is traceable to the defendant's actions; and (3) the injury likely will be redressed with a favorable decision. *See Bangerter* v. *Orem City Corp.*, 46 F.3d 1491, 1498 (1995)(citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 2136 (1992)). "[T]he . . . courts have no business deciding [matters], or expanding the law in the course of doing so," if the plaintiffs have not sustained an actual injury, regardless of how important the legal issue is. *Freedom From Religion Found. v. City of Green Bay*, 2008 WL 4516853 at *2 (E.D. Wis.)(quoting *Daimler Chrysler Corp. v. Cuno*, 654 U.S. 332, 341 (2006)).

The district court found, and the Eighth Circuit agreed, that all but two petitioners (Amal Mohammed and Yurub Siyad) lack standing to

challenge the deferred-testing policy because they failed to provide any evidence of injury caused by that policy. *See* Pet. App'x at 9a, n.3. As to all petitioners other than Amal Mohammed and Yurub Siyad, then, the petition must be denied due to the lack of a case or controversy conferring jurisdiction on this Court.

Petitioners claim they had standing to challenge the deferred-testing policy because testing could "rule out" disabilities, as well as diagnose them. Pet. at 21. As "candidates for this testing," they say, they were injured because they were not evaluated to establish that they did *not* have learning disabilities and were not eligible for special education services. *Id.* This argument is based on an erroneous assumption that every student has a legal right to be evaluated for special-education assistance.

The Individuals with Disabilities Education Act ("IDEA") governs the extent to which the student is legally entitled to "special education" services, including testing and evaluation. 20 U.S.C. §1400 et seq. "Special education" means specifically-designed instruction to meet the unique needs of a *child with a disability*. 20 U.S.C. § 1401 (29)(emphasis added).

A student is a "child with a disability" only if he suffers from a statutorily defined impairment. *See* 20 U.S.C. § 1401 (3). Being a "slow learner" alone is not enough. *See Wong v. Regents of Univ. of Cal.*, 410 F 3d 1052 (9th Cir. 2005)(having an impairment does not mean a person is "disabled" as defined by the statute). Recognized impairments include a "specific learning disability." 20 U.S.C. § 1401(3).

A "specific learning disability" means:

> [A] disorder in which one or more of the basic psychological processes involved in understanding or in using language...manifest[s] itself in the imperfect ability to listen, think, speak, read, write...or do mathematical calculations....

20 U.S.C. § 1401(20). However, a "specific learning disability" does "not include a learning problem that is primarily the result of...environmental, cultural, or economic disadvantage." *Id.* A student with a "specific learning disability," then, does not include a student whose academic progress is impeded by non-disability-related factors, such as poor attendance, lack of motivation or limited educational opportunities.

Regulations promulgated under the IDEA expressly forbid schools from categorizing a student as a "child with a disability" if:

> (1) The determinant factor for eligibility determination is –
>
> (i) Lack of instruction in reading or math; or
>
> (ii) Limited English proficiency; and
>
> (2) [T]he child does not otherwise meet the eligibility criteria.

See 34 C.F.R § 300.534 (effective to 10/12/06); *see also* Minn. R. 3525.1341 (2008).

With only two exceptions, the petitioners (Harun, Mohammed A. Mohammed, Ahmed, Ibrahim,

Safiyah Mohamed, Osman, Siyad, Iftu, Shamsa Mohamed, Muse and Mumid) each testified under oath that he or she does not suffer from a learning disability. Record at A-App. 704, 754, 504, 586, 543, 562, 677, 549, 624, 494, 476. Petitioners must be bound by their own admissions.

Furthermore, petitioners failed to present any testimony by a qualified special-education expert that their individual progress suggested a "specific learning disability," as opposed to lack of prior education or evolving English language skills. Since the petitioners did not have a "specific learning disability" as defined by federal law, they were not eligible for special education testing or services under the IDEA. And, since they were not eligible for testing, they have sustained no injury as a result of the District's policy of deferring special education evaluations until ELL students had received three years of academic instruction. The petition accordingly must be dismissed with respect to these eleven petitioners for lack of standing and a justiciable controversy.

Conclusion

Petitioners have failed to identify a split among the Circuit Courts of Appeals on the Title VI issue presented for review, and further have failed to identify any compelling public interest worthy of this Court's attention. In addition, eleven of the thirteen petitioners lack standing to challenge the special education policy at issue. Abraham Lincoln respectfully requests that the Court deny the Petition on these grounds.

Respectfully submitted,

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